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ABSTRACT

The Supreme Court's controversial "community standards" ruling in "Miller v. California" (1973) states that for materials to be judged obscene, they no longer need to be "utterly without redeeming social value," but must lack serious literary, artistic, political or scientific value, and that the question of offensiveness will be judged against local, not national, community standards. This report examines this ruling as it relates to three obscenity-related prosecutions: Larry Flint and his "Hustler" magazine, Al Goldstein and his publication, "Screw," and Harry Reems, an actor in the film "Deep Throat." These three trials have much in common in that they reveal the following problems associated with prosecuting national media in local jurisdictions: venue shopping in the use of conservative communities for prosecution, entrapment, political motivation for prosecution, and the use of conspiracy and organized crime statutes. The report reviews and analyzes these problems as they apply to each of the three cases, explains how the Supreme Court came to the Miller decision, and discusses some arguments surrounding the First Amendment and censorship issues. (MAI)

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FREEDOM OF INFORMATION CENTER REPORT NO. 391

OBSCENITY: THREE CASE STUDIES

This report was written by Margie Kelly, an M.A. candidate at the University of Missouri School of Journalism.

"I know it when I see it," said Supreme Court Justice Potter Stewart.

"Disgusting to the senses," says the dictionary; "abhorrent to morality or virtue; designed to incite lust or depravity."

Such definitions of obscenity may be tidy, but they are hardly sufficient for the U.S. legal system, which has been wrangling with a definition for decades. Most recently, responsibility for deciding what is obscene has been left with local communities by the Supreme Court's 1973 Miller ruling. Though the trial of Larry Flynt and his **Hustler** magazine has been the most publicized under the new ruling, it is only one of three major recent cases; the others concern Al Goldstein and his publication **Screw** and the actor Harry Reems, in connection with the film **Deep Throat.**

Though there has been no increase in obscenity-related prosecutions since the 1973 decision, according to a **New York University Law Review** survey, the new element in the trials seems to be the eagerness of some local officials and U.S. attorneys to prosecute national publishers or actors who have little connection with the local jurisdiction.[1]

The **Hustler, Screw** and **Deep Throat** trials have much in common and reveal the host of problems associated with prosecuting national media in local jurisdictions: venue-shopping and the use of conservative communities for prosecution, as was alleged in all three cases; entrapment and political motivation for prosecutions, as has been alleged in the **Screw** trial; and the use of conspiracy statutes, in both **Screw** and **Deep Throat,** and the organized crime statute, in the **Hustler** case. This report will examine these factors as they relate to the three cases; review briefly how the Supreme Court came to the Miller decision; and discuss some arguments surrounding the First Amendment and censorship issues, in an attempt to gain a broad perspective on the implications of the "new" obscenity.

The Supreme Court's Obscenity Rulings

In the 1957 **Roth v. U.S.** case, the Supreme Court for the first time ruled that obscenity is outside the protection of the First Amendment. Since that time, the Court has explored different methods of defining obscenity, but the Miller changes can be seen most clearly in contrast to the three-pronged test established in 1966. In essence, the 1966 **Fanny Hill** test said that, to be judged obscene, material must:

1. appeal primarily to a prurient interest;
2. be patently offensive when judged by community standards;
3. be utterly without redeeming social value.[2]

In the **Miller v. California** ruling of June 21, 1973, the Court's conservative majority of Chief Justice Warren E. Burger, Harry A. Blackmun, Lewis F. Powell Jr., William H. Rehnquist and Byron R. White announced a modification of this test. The primary changes are that:

1. works must no longer be "utterly without redeeming social value" but must lack serious literary, artistic, political or scientific value;
2. the question of offensiveness will be judged against local, not national, community standards.[3]

Harry Reems and 'Deep Throat'

Under the 1973 Supreme Court ruling, the movie **Deep Throat** was among the first cases to be prosecuted on a federal level. Described in the New York **Times** (3-2-73) by New York Judge Joel Tyler as a "feast of carrion and squalor" — "a nadir of decadence" — "brazenly explicit" — "a Sodom and Gomorrah gone wild before the fire," the movie is about a heroine whose clitoris is located in her throat and it has been called (San Francisco **Chronicle,** 5-17-73) the "esophagus-oriented classic movie of its genre."

Moviegoers and profits have flocked to the film, but so have lawsuits. Confiscated in Tampa, Fla., banned in Toledo, Ohio, and Maryland, and convicted in Cedar Falls, Iowa — among many other jurisdictions — the film has been successfully prosecuted across the U.S. And in several cases — Binghamton, N.Y., for example — juries have decided (New York **Times,** 12-31-72) it was not obscene.

The most important and well-publicized trial, however, was held in Memphis. While none of the other prosecutions was against the film's actors or principal financial backers,

Summary: Since the Supreme Court's controversial "community standards" ruling in **Miller v. California** (1973), there have been three major obscenity cases, those concerning **Screw, Deep Throat** and **Hustler**. This report discusses the problems arising when national media are prosecuted in local jurisdictions and includes a consideration of the broader arguments on pornography and free speech.

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the Memphis trial was.

The central figure in Memphis was Harry Reems, the first actor or artist to be federally prosecuted for his work (Lenny Bruce was prosecuted on the local level). Described by Sally Quinn in the Washington **Post** (6-3-76) as "a very nice-looking, clean-cut kind of guy," Reems was as surprised as anyone else to become the "star" of the Memphis drama. Originally a straight actor, playing bit parts with the National Shakespeare Company, Reems got (New York **Times**, 3-6-77) into pornographic films as a way to make money. And he got into **Deep Throat** by a fluke.

Hired as a $25-a-day assistant grip for the shooting of the film in Miami, Reems took the male lead opposite Linda Lovelace when the director had trouble casting the part. Reems worked one day, was paid $100, and signed the standard day-player's contract waiving artistic, marketing and distribution rights to the movie.

Two and a half years later, in July of 1974, the actor was arrested in New York City by FBI agents acting under a federal warrant. Extradited to Memphis, where he had never been before, Reems stood trial in March and April of 1976 as one of 17 co-defendants accused of conspiring to transport obscene material (a print of **Deep Throat**) across state lines. Linda Lovelace and director Gerald Damiano were granted immunity for becoming state's witnesses.

Though convicted, Reems was granted a new trial – and charges later were dropped — because the jury had been instructed to judge Reems on the 1973 Miller criteria, which had not been in effect when he played the role in 1972.

Though the new Miller obscenity criteria do not legally apply to the Reems case, they will be studied here because the trial was in fact conducted — and Reems convicted — on those grounds. And as one of Reems' defense attorneys conceded, the jury probably would have found (Kansas City **Times**, 3-26-77) **Deep Throat** obscene under any standards.

Al Goldstein and 'Screw' Magazine

Unlike the trial of clean-cut Harry Reems, to whom sympathizers rallied, Al Goldstein's trial in Wichita passed virtually unnoticed and unsupported. An obese man with bushy hair and beard, Goldstein is a person who seems to delight in being offensive. His publication **Screw** lambasts and ridicules virtually everyone and everything, including the Pope and the Supreme Court justices. In one issue, the magazine ran (New York **Times**, 3-6-77) a cartoon of the justices in sex acts with animals, vegetables and minerals.

Screw magazine — published in New York, where half its 125,000 circulation goes — came to trial (St. Louis **Post-Dispatch**, 3-9-77) in Wichita through the efforts of a New York postal inspector, Ray Lombardi. At his direction, six issues of **Screw** and five of **Smut** — another Goldstein publication, which was also indicted — were sent to Kansas to the fictitious T. Manning in Lawrence, A. Fisher in Hutchinson, W. Olson in Salina and John Mercer in Pratt. The issues were returned to Lombardi in New York, unopened, and Goldstein was then prosecuted in Wichita.

Indicted in December 1974, publisher Goldstein and his former partner, Jim Buckley, stood trial in May and June of 1976 on charges of sending obscene material through the mail and of conspiring to do so. As one of the indictments read, the defendants knowingly caused to deliver by mail

> an envelope containing an obscene, lewd, lascivious, indecent, filthy, and vile tabloid entitled **Screw**, No. 257, said tabloid not being further described in this Indictment as the same would defile the records of this court. . . .[4]

Though both Goldstein and Buckley were convicted, the judge ruled a mistrial because of inflammatory remarks by the prosecutor in his closing statement to the jury. The judge granted a retrial and a change of venue to Kansas City, Kan., where the trial ended in a deadlocked jury. In February of 1978, the prosecution finally ended (Kansas City **Times**, 2-15-78) when a plea bargain was agreed upon; all charges against Goldstein, Buckley and **Screw** were dismissed, and Milky Way Productions Inc. pleaded guilty to five counts of mailing obscene issues of **Smut** and one count of conspiracy.

Larry Flynt and 'Hustler'

In the most recent of the three trials, the central figure is Larry Flynt, whose publishing empire includes not only **Hustler** but **Chic** magazine, MCA Advertising, Flynt Distributing Company and Leisure Time Products — a mail-order operation selling paraphernalia for sex. Called "the magazine nobody quotes" by its own advertising posters, **Hustler** has printed photos of:

> a brunette being ravished by a snake, a pictorial feature of a nude women $8\frac{1}{2}$ months pregnant, and gruesome illustrations of various genital and gynecological oddities. The cartoons seek sick snickers in such topics as castration, excrement, bestiality and, in one memorably tasteless panel, Betty Ford's breast cancer.[5]

In comparing **Screw** and **Hustler**, Robert Yoakum notes that the former is hard core in that it shows

> explicit sex acts; but funny captions, political polemics. . . and a general atmosphere of mockery do much to dilute prurience. **Hustler** is not explicit, but its slick paper, crotch shots, and hardhat prose make it the raunchier of the two.[6]

Even Larry Flynt's lawyer has observed that his client is among those "who may be said to dwell on the dark side of the First Amendment."[7]

Like Goldstein and Reems, Flynt, too, was prosecuted in an illogical jurisdiction. Though he operates out of Columbus, Ohio, Flynt was tried in Cincinnati. After a trial closely watched by civil libertarians and widely commented upon by the press, Flynt was convicted, and his case is now on appeal in the First Appellate Court of Ohio.

Although the previous cases involved conspiracy charges, Flynt was convicted under a statute prohibiting organized crime, defined in Ohio as five or more persons engaging in illegal activity for profit. The illegal activity was "pandering obscenity," for which Flynt received a sentence of six months in jail and a $1,000 fine. On the organized crime charge, however, he was handed 7-25 years and a $10,000 fine.

The most commented upon of the three cases, Flynt's trial was flamboyant throughout. Before the jury had even delivered the verdict, for example, the prosecution handed the judge a new 12-count indictment against Flynt in connection with the pamphlets he distributed showing war dead and wounded, designed to "get a barometer of what local standards really are."[8]

Amidst the other fanfare surrounding Flynt's trial was a full-page ad in both the New York **Times** and Washington

Post entitled "Larry Flynt: American Dissident," signed by everyone from Woody Allen to Gore Vidal. And in the December issue of **Politicks & Other Human Interests,** Flynt ran a humorous piece entitled "A Visit From St. Censorless," which read in part:

> Twas the night before Christmas,
> And all through the city
> Not a publisher published
> A dirge or a ditty.
> The presses were silent, as silent as night,
> For the ink had been spilled in the heat of a fight. . . .[9]

A plea for support, the poem ended with the line: "Put the X back in Xmas and let Truth prevail!"

While awaiting appeal, Flynt has not been idle. His clean-up-the-image campaign has included a religious conversion by Ruth Carter Stapleton; a move turning control of his empire over to his wife; and a new official photograph, described by the Chicago **Sun-Times,** (3-10-77) as "designed to make him look as somber and respectable as the president of the Columbus Chamber of Commerce."

Tragically, Flynt was seriously wounded in a recent shooting, but he is expected to be able to stand trial as scheduled in the fall.

Community Standards — Which Ones?

As is evident in all of the cases cited here, prosecution has not been in the logical jurisdictions. And in all three cases, accusations have been made of venue-shopping, a process whereby the government picks a spot where conviction is likely by community standards.

Whether or not there was verifiable venue-shopping, however, all three cases were indeed tried in conservative areas — **Hustler** in Cincinnati, the home of Citizens for Decent Literature; **Deep Throat** in Memphis, described (New York **Times,** 3-6-77) by Harry Reems as "the buckle of the Bible Belt"; and **Screw** in Wichita, where the grand jury that indicted the publication began its daily proceedings with a prayer.

Because the three cases differ in detail, a case-by-case discussion will give a better picture of the communities involved and reveal more clearly whether venue-shopping, entrapment and other issues were involved.

The Community of Memphis

In the **Deep Throat** case, Harry Reems did his acting in Miami, the film was distributed nationally, and Reems was charged with conspiracy to ship prints interstate. The case could be tried anywhere and conservative Memphis became the spot. As defense lawyer Leonard Cohen said,

> We are at a loss to understand why. . . the United States Attorney for the Western District of Tennessee would desire to prosecute a conspiracy of this magnitude where, under the indictment, most of the defendants had no connection whatever with his district.[10]

Why was Memphis chosen? "Because Larry Parrish is there," said (New York **Times,** 3-6-77) a Reems defense attorney.

Larry Parrish, some would argue, was the "community" that convicted Harry Reems and **Deep Throat.** Dubbed (New York **Times,** 3-6-77) by the press "The Memphis Heat" and "Mr. Clean," Parrish was described by **Variety** as "Central Casting's idea of the perfect prosecutor: young, tall, handsome, well-dressed, stating his neat logic in dulcet southern overtones, mixing fact, fury and theatrical humor."[11]

Describing himself, the Memphis assistant district attorney said (New York **Times,** 3-6-77): "My personal inclinations are much more strict than the law. From the time I was a little child I went to church. I rarely missed a Sunday, even in college." He added, "If you want to know why I am a prosecutor, you can read Romans 13." In the King James version of the Bible, Romans 13 is a warning to evildoers that God has appointed ministers on earth to carry out His wrath. As one journalist commented (New York **Times,** 3-6-77), "It is a singular conception of the prosecutor's job."

Was Parrish acting on orders from Washington in the prosecution of **Deep Throat**? Richard Rhodes, writing for **Playboy** magazine, said the immediate indictments "almost certainly" originated with Parrish:

> Which is not to say that the ghosts of Nixon and Mitchell don't walk abroad in the Memphis courtroom, because they do: propelled by the decisions of the Nixon Supreme Court that made the trial possible; by the cooperation, since at least 1971, of the FBI. . . by the approval by the Nixon and Ford administrations of grants of immunity, which are coordinated in Washington.[12]

Reems' attorney, Alan Dershowitz, also questioned (New York **Times,** 3-6-77) the autonomy of the local decision to prosecute:

> Local prosecutors act at least with tacit approval from Washington. A strong memo from Washington goes a long way. You could not get a runaway U.S. attorney, prosecuting black civil rights leaders in the South. The responsibility lies squarely in the lap of the Attorney General. If he does not want obscenity trials, he has ways to see to it that they stop.

Larry Parrish denied the government was venue-shopping for conservative courts. Speaking to the Adult Film Association convention, Parrish said he could convict **Deep Throat** anywhere.

> You are the ones who do the forum shopping. You operate out of California and want to be prosecuted in California. A real briar patch choice. Well, you are the ones who bring the materials into Memphis. Nobody makes you bring them there.[13]

The Community of Wichita

In the Wichita prosecution of **Screw** magazine, Goldstein, for one, felt (Kansas City **Times,** 4-19-77) he was being tried in an inappropriate area:

> I feel like a black going on trial in Mississippi. . . . You may as well throw me in prison because I don't stand a chance in hell. You people are different than I am, you think differently, my paper isn't made for people in Wichita and you're out to hang me.

In Wichita, as in Memphis, a zealous prosecutor was on

hand to oversee the trial. Larry Schauf in the **Screw** trial seemed to have as keen an interest in obscenity as Larry Parrish in the **Deep Throat** trial. Ted Morgan, writing in the New York **Times** (3-6-77), noted that "Schauf and Parrish held frequent end-of-the-afternoon telephone conversations on how their respective trials were going."

In the **Screw** case, the original Wichita conviction was overturned because of Schauf's inflammatory summation. In that summation, he used (New York **Times**, 3-6-77) the word "decency" 42 times and described the issue as one between clean-living Kansas and morally bankrupt New York. "Is decency dead?" he asked. "Do we have to hold a mirror to decency's face to see if she is breathing?"

After those remarks caused the original trial to be thrown out, a change of venue to Kansas City, Kan., was granted (Kansas City **Times**, 4-19-77) for the retrial, apparently because of the obscenity war that had meanwhile been launched by Vern Miller, Sedgwick County (Kan.) attorney and local police chief. Among other actions, Miller personally raided (Kansas City **Times**, 4-19-77) movie theaters and spoke from a church pulpit, in a televised Sunday service, urging listeners to tell potential jurors of the danger of pornography.

Though this uproar against pornography occurred after the Wichita trial and before the change of venue for the retrial, it gives some indication of the community standards by which Goldstein was judged.

Did the 'Screw' Case Involve Entrapment?

How Goldstein came to be tried in Wichita involves the additional complications of possible entrapment and possible political motivation. According to Robert Yoakum, writing for the **Columbia Journalism Review**, **Screw** had 14 subscribers in Kansas at the time of the indictment, December 1974. Four of these were the fictitious names used by postal inspector Ray Lombardi. In Wichita itself, there was one subscriber. **Screw** did not solicit subscribers in Kansas and had no newsstand sales there. **Smut** had neither subscribers nor newsstand sales in Kansas, according to Yoakum.[14]

According to Lombardi, the New York postal inspector who ordered the fake subscriptions, **Smut** had (Kansas City **Times**, 11-2-77) one subscriber in Kansas and **Screw** had about a dozen subscribers in the state.

The magazines Lombardi ordered into Kansas — known as "test buys" — have become more popular following the Supreme Court's Miller decision, wrote Yoakum.[15] As Lombardi explained in the trial, the test-buy procedure allowed (Kansas City **Times**, 11-2-77) him to view the magazines for possible obscenity violations, maintain an unbroken chain of evidence and trace where the subscription payments went by using money orders.

"In a case like this, where the government is mailing obscenity to itself," wrote Joel Gora of the ACLU, "it seems clear that there has been entrapment as most people understand that word."[16]

Judge Frank G. Theis, however, ruled the argument irrelevant, saying the procedure did not constitute entrapment. And the Supreme Court, in **U.S. v. Russell** (1973), supported Theis' argument. According to the Russell decision, entrapment involves persuading someone to do something he or she would not normally do. If a person has a predisposition to sell heroin, for example, it is not entrapment for the government to arrange a buy. [17]

Was the 'Screw' Prosecution Politically Motivated?

An additional accusation made in the **Screw** case was that of political motivation. Some argue that **Screw** was a political magazine; **Screw** No. 273, for example, carried a "funny, vulgar two-page parody of the Watergate tapes," and editorials in each issue deal with "politics or the politics of sex."[18]

Noting that **Screw** runs editorials on current affairs, supports political candidates and compiles information on sexual repression, attorney Alan Dershowitz said (New York **Times**, 3-6-77):

> It seems clear that the prosecution against **Screw** and its publishers was motivated, at least in part, by its vicious diatribes against our established institutions and those who run them.

Further, Dershowitz said,

> It is not surprising that the Nixon-Mitchell Justice Department — which listed pornography, but not gun control, among the five most important law-enforcement priorities — should have set its sights on Goldstein and his smut empire.[19]

Prosecutor Larry Schauf, on the other hand, ridiculed the idea that Goldstein was Nixon's victim. "He flatters himself. There's no significant political content to this magazine," Schauf said.[20] Referring to the 12 "bust issues" — copies of **Screw** and **Smut** chosen for the case — Schauf said: "You will find one article and half a dozen sentences on politics out of those twelve issues, which are fifty pages long apiece."[21]

The Community of Cincinnati

Hustler magazine — published in Columbus, printed in Dayton and distributed out of Derby, Conn. — was prosecuted in Cincinnati, a city which the executive director of the ACLU said (New York **Times**, 2-9-77) "takes alleged obscenity very seriously." Cincinnati is the home of Citizens for Decent Literature.

The St. Louis **Post-Dispatch** criticized (2-11-77) the overzealous attitude of the prosecution, citing the 12-count indictment returned on the war pamphlets before the verdict was in on **Hustler** and the temporary denial to Flynt of bail pending appeal, which resulted in his spending nearly a week in jail. Said the editorial: "This looks like overkill designed to intimidate others."

Of the three cases, **Hustler** drew the most comment on the concept of community standards. While the majority of comments, it seemed, denounced the idea, illuminating arguments were offered on both sides. Though the comments cited here mainly concern **Hustler**, they are offered as a general forum of comment on the concept of letting community standards determine what is obscene.

The Community Standards Debate

James J. Kilpatrick noted that "virtually no one" would construe freedom of the press as an absolute. But no matter how that freedom is construed, he added,

> in terms of its application to libel, advertising matter, postal regulations, newspaper mergers, or whatever, the same constitutional constructions apply universally. Except as to obscenity.
>
> This inexplicable inconsistency lies at the heart of

the case of Larry Flynt. . . .

It is difficult for me to understand. . . how the First Amendment can have one meaning in Cincinnati and another meaning in New York. . . . The concept of constitutional construction by community appears nowhere else. We do not have community standards for auto theft or bank robbery. How is it that obscenity got to be different?[22]

Also concerning the community standards aspect of the **Hustler** case, an **Advertising Age** editorial commented:

Since it is not easy to determine the prevailing standard for even one community, this is still an elusive test. But it at least has the advantage of letting the community try to protect itself without inhibiting freedom of speech elsewhere by imposing that community's standards on the rest of us. Now, however, we have a prosecutor and a common pleas court which are not satisfied merely to try to keep an offensive publication from local newsstands. They have reached out and imprisoned the publisher for distributing a publication which to date is acceptable in most other jurisdictions.[23]

A Miami **Herald** editorial commented (2-10-77):

Around the nation, no doubt, there are those who find offensive the things that other people choose to read or publish. We find them offensive, too, but who are we to make that choice for others? And if we can compel anyone to not read anything, can we then compel them to read, under force of law, National Geographic or the Congressional Record?. . . If there is a single community standard by which Hustler should be gauged, it is of a community of some three million alleged readers who have chosen to be there.

And as the New York **Times** summed up (2-9-77) the criticism,

the question raised by the obscenity trial of a national magazine is which community standards should prevail? Would the standards of the most conservative community in the country, for instance, be a valid test in which to judge whether a national publication was obscene?

Arguments defending the community standards aspect of the **Hustler** trial, interestingly, used many of the same principles of those attacking. Malcolm B. Johnson, editor of the Tallahassee **Democrat**, for example, argued the reverse of the New York **Times**: a national standard for obscenity, he said, would be more oppressive than local standards. A national standard, he wrote (Miami **Herald**, 2-25-77),

is the route to having morality judged on the basis of the lowest common denominator: Whatever is acceptable in the most tolerant town or neighborhood in the land must be tolerated in the most straightlaced.

It isn't that way with the gambling laws, with prostitution, with any number of other activities which are offensive to some communities, acceptable in others. There's every reason to apply the local option standard to banning obscene literature and movies from a town, or from a neighborhood.

Syndicated columnist George F. Will similarly defended (Washington **Post**, 2-17-77) the use of community standards:

There is little reason to doubt that "Hustler" would be declared obscene by community standards, before any representative jury in any of the 50 states.

If Flynt and his lawyers did not know that, by Ohio standards, he was manufacturing and distributing obscenity, then he has foolish lawyers and his lawyers have a fool for a client. But, of course, he not only knew but boasted that he was producing obscenity unprecedented in a slick, mass-circulation magazine.

Supreme Court justices, in laying down the Miller and other obscenity decisions of the period, considered many of these arguments. Dissenting in one of these cases, Justice William O. Douglas wrote:

Every author, every bookseller, every movie exhibitor and perhaps every librarian is now at the mercy of the local police force's conception of what appeals to "prurient interest" or is "patently offensive." The standards can vary from town to town and day to day in an unpredictable fashion. How can an author or a bookseller or librarian know whether the community deems his books acceptable until after the jury renders its verdict?[24]

Defending the concept of community standards in the Miller decision, Chief Justice Warren Burger rejected a requirement of national uniformity. "People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed authority."[25] He said a jury trying to decide if materials are obscene is not required to consider "hypothetical and unascertainable 'national standards.' " Burger wrote:

It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas or New York City.[26]

In the most recent Supreme Court test — the May 1978 trial of William Pinkus — the Court ruled (New York **Times**, 5-24-78) that children must not be considered a part of the community when allegedly obscene material aimed at adults is being tested against "community standards." The ruling stressed, however, that the views of all adults must be considered, even "the most susceptible or sensitive members" of the community.

Conspiracy and Organized Crime Statutes

While the concept of community standards has been a major point in the **Deep Throat**, **Screw** and **Hustler** trials, another crucial aspect is the use of conspiracy and organized crime statutes. As a Los Angeles **Times** editorial said (2-10-77),

Conspiracy statutes give a zealous prosecutor a

> dangerous weapon; if a prosecutor cannot convict a person of a specific crime, the prosecutor can resort to the conspiracy laws, always vague and elastic.

In the Al Goldstein trial, only one of the 12 counts — all for mailing obscene material from New York to Kansas — was a conspiracy charge. Had the guilty verdict been upheld (which it was not), Goldstein and Jim Buckley, his former partner, could have been sentenced to 60 years in prison, in addition to fines.

In Larry Flynt's trial, the controversial Ohio organized crime law was used to make possible a stiffer penalty. Convicted on the usual charge of "pandering obscenity" — punishable by a maximum of six months' imprisonment and a $1,000 fine — Flynt also was found guilty of engaging in "organized crime," a felony that brought an additional seven to 25 years in prison and a $10,000 fine. As defined by Ohio law, organized crime occurs when five or more persons conspire for profit in a criminal enterprise. As one journalist noted, "Flynt was indicted with other people, including his wife and brother, but the rest — illogically — were acquitted. Flynt became a one-man perpetrator of 'organized crime.' "[27]

Concerning the organized crime statute, Nat Hentoff wrote that if Flynt's conviction should stand,

> other states might well pass similar statutes, and both publishers and distributors could find themselves deeply involved in heartfelt self-censorship to avoid being rounded up along with the Mafia.[28]

In the Memphis trial of **Deep Throat**, there were (New York **Times**, 3-6-77) 77 overt acts in the conspiracy as charged and the only one mentioning Harry Reems was the seventh overt act. (Reems is mentioned by his real name — Herbert Streicher.) The conspiracy to which Reems was a party was stated as:

> Between January 10, 1972, and January 19, 1972, Anthony J. Peraino, Linda Traynor (Linda Lovelace), Charles Traynor, Gerald Damiano, Joao Fernandez, Ronald Wertheim, and Herbert Streicher traveled from New York, New York, to Miami, Florida.

In addition to the 12 defendants of the Memphis case, there were 98 unindicted co-conspirators, including the New York advertising agency that had prepared ads for **Deep Throat** and some of the projectionists at theaters where the film had been shown.

The Conspiracy Debate

Discussion of the use of conspiracy statutes in obscenity cases has centered around the Reems case, for sympathy has surrounded this actor whose one-day participation earned him $100 but cost him thousands of dollars in court costs. Too, the **Deep Throat** case most clearly illustrates the dragnet possibilities of the conspiracy laws. As one writer noted:

> Anyone, anywhere, who helped make **Deep Throat**. . . the gaffer who arranged the lights; the Florida bachelor who lent the **Deep Throat** crew his swimming pool and his house; the laboratory that processed the rushes; the many projectionists. . . was theoretically part of the conspiracy and could have been indicted.[29]

Reems was considered (New York **Times**, 3-6-77) a participant in the conspiracy beyond his acting role because of the doctrine of "vicarious responsibility," which states that once a conspiracy begins, everyone in it is responsible for every act involved. Thus, to withdraw from the conspiracy, Reems said (New York **Times**, 3-6-77), "I would have had to take the prints off the projectors and destroy them, which in itself is a criminal activity."

Conspiracy laws "are covering people they were never intended to cover," said (St. Louis **Post-Dispatch**, 7-4-76) Alan Dershowitz, Reems' chief attorney for appeal. Dershowitz maintained his client did not participate in the final editing or production of **Deep Throat**; had no way of knowing what the final product would be, at the time of his acting role; had no way of withdrawing from the alleged conspiracy; and thus should not be considered a conspirator.

"These conspiracy cases are the lazy prosecutor's way of doing things," Dershowitz said (New York **Times**, 3-6-77).

> Go into any Federal court today, and you are bound to see conspiracy cases on the dockets. It is the most dangerous prosecutional tool available in the United States today. It is used as a dragnet.

As prosecutor Larry Parrish countered (New York **Times**, 3-6-77), "Dershowitz and others like him who have never prosecuted a conspiracy case think it's unfair. But would they say conspiracy should be eliminated from the law?" Parrish maintained that conspiracies to transport obscene films are no different from conspiracies to violate antitrust laws.[30]

"You know I was only a day player and was paid only $100 for my role in **Deep Throat**," Reems told **Variety**, adding he would fight all the way "on the grounds that actors have no role in the distribution of films."[31] And noting the immunity granted Linda Lovelace and director Gerald Damiano, one journalist said (Washington **Post**, 6-16-76), "If Reems is guilty of an obscene conspiracy, the Justice Department is guilty of being grotesque in public."

Parrish disagreed with these arguments.

> It's not true that an actor plays a small part in these films. As Judge Wellford pointed out, if you don't have actors and actresses, you don't have these films in the first place.[32]

Parrish conceded that a person must have knowledge of the general nature of the film in order to be guilty. But if an actor "knows it's a film about sex," Parrish explained, "he bears the risk. . . . no one can participate in 35 minutes of intercourse on camera and say he doesn't have knowledge of what the film is about."[33]

Should Pornography Be Regulated at All?

While the use of conspiracy and organized crime statutes in the **Deep Throat**, **Screw** and **Hustler** trials has drawn much discussion — as have the issues of community standards, venue-shopping and political motivation — discussions of the cases eventually come to the more central issue involved: Should pornography be regulated at all? While this complex matter cannot be covered sufficiently in a paper of this scope, no discussion of obscenity and pornography would be complete without its mention. Since the Flynt trial was the most widely publicized of the three, it was around **Hustler**

that the debate centered, and it is those arguments that are cited here. While no attempt is made to cover all the points raised, some of the more insightful cases made for each side will be mentioned.

The majority of editorials concerning the **Hustler** case were pro-First Amendment, anti-censorship. Typically, they began with a denunciation of the magazine, similar to Ernest B. Furguson's in the Los Angeles **Times** (2-13-77): "Start with the indisputable premise that **Hustler** is an abominable publication. . . ." And typically, they ended with calls to defend Flynt in the name of freedom. As a New York **Times** editorial said (2-26-77):

> There is little virtue in leaping to the defense of admirable publications. The test of our commitment to a free society lies in the courage to defend the disreputable or the vulgar in the service of a higher goal.

Arguments ranged from the dramatic — as in Flynt's statement (Los Angeles **Times**, 2-9-77), "I am proud to be a part of the fight for freedom, not only of the printed word but for all forms of expression" — to the more cautious — as in Hugh Hefner's statement (St. Louis **Post-Dispatch**, 2-9-77), "There is much in **Hustler** I find tasteless," but "to prosecute a man because his taste happens to differ from yours or mine is far more outrageous than anything ever published by Larry Flynt."

One of the most notable — and noticeable — condemnations of Flynt's conviction was the full-page ad taken out in both the New York **Times** and the Washington **Post**. With a headline reading "Larry Flynt: American Dissident," the ad was signed by a wide range of public figures, from John Dean and Ramsey Clark to Judith Crist.

One of those on the opposite side of the debate was Lewis H. Lapham, editor of **Harper's**, who declined to sign the ad.

> . . . I made the mistake of buying Mr. Flynt's magazine. . . . Mr. Flynt doesn't make it easy to quote passages from Milton's **Areopagitica**. The juxtaposition would be as ludicrous as the juxtaposition of Larry Flynt and Alexander Solzhenitsyn.[34]

Noting that **Hustler** had "subliminal suggestions of cannibalism, homosexuality, sadism, narcissism, and homicide," Lapham asked: "How is it possible to construe the degradation of human beings as a constitutional right?"[35]

Attorney Charles Rembar, who helped win landmark decisions against censorship in the 1960s, attacked the "voguish furor about anti-obscenity laws," saying it "diminishes the public perception of the First Amendment."[36] He noted "the silliness. . . of so many who rush to grab and wave the First Amendment banner," and added: "The First Amendment has serious work to do. Invoked too often and too broadly, it can grow thin and feeble."[37]

Feminists entered the debate on both sides — some favoring censorship, some not — but virtually all agreed that liberals jumped too quickly on the Flynt bandwagon, without considering the effect of pornography on women. As Laura Shapiro wrote in **Mother Jones** magazine:

> The bridge between the use of women's bodies in popular culture and the use of women's bodies by rapists and sadists is a short one and easily crossed: the way is paved with pornography.
>
> Women who are unable to walk to the corner mailbox at night, whose stomachs clench when they see a man on the sidewalk ahead walking straight toward them, who take more taxis than they can afford and who live behind four sets of locks, are not especially comforted to remember that the civil rights of a crotch-peddler like Larry Flynt are under constant vigilance by anxious liberals. In the sacred hierarchy of defensible rights, a woman's physical freedom ranks low, and the preservation of her self-respect has no place at all.[38]

The "slippery slope" argument — similar to the "domino theory" of international politics — was one often cited in attacking the regulation of obscenity. As one journalist commented (Los Angeles **Times**, 2-13-77):

> Precisely where, in inches, does distasteful display of the human body become illegal? If the conviction of Flynt is intended as a warning to Hugh Hefner and others in the skin trade, where does the warning stop — just before it moves on to Henry Miller, or just this side of James Joyce?

Similarly, Flynt's lawyer, Herald Fahringer, commented after the guilty verdict was delivered: "Freedom is not lost in one single stroke, but one book at a time. Maybe it will be **Esquire** next."[39] And as Flynt himself commented,

> Obscenity is like the concept of sin — it defies definition. If we start restricting adult reading habits by what's fit for children, we could be left with only "Little Red Riding Hood."[40]

Countering these arguments were statements, like Charles Rembar's, that obscenity is "no harder to define. . . than other concepts the law engages every day — 'the reasonable person,' for example, or 'good faith,' not to mention 'fair trial.' "[41]

In an extensive rebuttal of the "slippery slope" argument, Columnist George F. Will wrote (Washington **Post**, 2-17-77):

> The idea is that "obscenity" (unlike, presumably, "unfair labor practices" or "fraudulent advertising") is too subjective a category for other than capricious use in law. Hence, censorship of obscenity is opposed by those who cite the "slippery slope" argument: "Once it starts, how will society know when to stop?"
>
> The "slippery slope" argument also can be made against taxation and police: Taxation might become expropriation; police forces might become Gestapos. But self-government rests on the confidence that communities can, generally and within a tolerable margin of error, make reasonable distinctions.

What Next?

Since the time of the Miller ruling, trials of national publications and films have been in the hands of local communities. Some are content to leave the matter there, while others call for a national standard. Some claim conservative communities are used to "get" certain films or publications, while others say conviction could be reached anywhere. And some, finally, claim the entire matter of

obscenity is a threat to the First Amendment.

But after all the debate surrounding the **Deep Throat, Screw** and **Hustler** trials, the fact remains that local community standards can be brought to bear on national films and publications. Harry Reems, Al Goldstein and Larry Flynt were convicted. Technicalities changed the first two convictions — Reems' charges were dropped, as were Goldstein's, though Goldstein's publication **Smut** remained guilty. And in the **Hustler** case, appeal is still pending. The question remaining is: What will happen next?

In the wake of these three trials, will artists begin toning down their work to avoid obscenity charges? Will distributors and the like play it safe to avoid the "dragnet" of conspiracy? Is freedom of the press truly on a "slippery slope"?

Definitive answers are not to be had, but there have been hints about the possible ramifications of the Miller obscenity ruling and the trials that followed it.

As for the effect on more serious works, it is worth noting that **Carnal Knowledge** — certainly a more serious film than **Deep Throat** — was the first film to be labeled obscene after the Miller decision. Charges were dropped, however.

On the other hand, **Last Tango in Paris** was ruled not obscene by a prosecutor in Oakland County (near Detroit) who had successfully blocked **Deep Throat** in earlier action.[42] After viewing the X-rated **Tango** film, the prosecutor said it did not meet the "dominant prurient theme test." In this case, at least, the "slippery slope" does not seem to be in effect.

As for distributors, the **Media Industry Newsletter** noted that:

> in wake of Larry Flynt's Cincinnati conviction, magazine wholesalers nationwide are keeping a watchful eye on the covers and contents of so-called men's sophisticated magazines they distribute, hoping to avoid the fate of the Cincinnati local wholesaler who was named an unindicted co-conspirator in the Flynt case.[43]

The newsletter added that certain wholesalers "have already begun rejecting certain prurient periodicals."[44]

Too, Ivan Ludington, president of the Council for Periodicals Distribution Association, warned wholesalers:

> There are no concrete guidelines we or our attorneys can give. . . . We can only urge each wholesaler to keep his ear close to the ground at the local level, consult with local law enforcement officials. . . and remind retailers they are not obligated to accept or put on sale any magazine they receive.[45]

As for the effect on publications that are not by most standards considered obscene, there has been one rather ominous development: the 13th count in the Wichita **Screw** trial — first upheld, then thrown out, by Judge Theis — would have held criminally liable publications printing reviews of obscene books or movies, if the publications are sent through the mail.[46]

It is impossible to tell at this point what the ultimate ramifications will be of the new obscenity rulings and the **Deep Throat, Screw** and **Hustler** trials. The community standards ruling of 1973 will face its ultimate test if the **Hustler** appeal makes it to the Supreme Court. Until that happens, if it does, surely a great many eyes will be closely watching the nation to see which magazines or films will next be tried, and by which community standards they will be judged.

FOOTNOTES

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4. Robert Yoakum, "An obscene, lewd, lascivious, indecent, filthy and vile tabloid entitled SCREW," **Columbia Journalism Review**, March April, 1977, p. 38.
5. "A Bad Case Makes Worse Law," **Time**, Feb. 21, 1977, p. 51.
6. Yoakum, "The Great Hustler Debate," p. 53.
7. Nat Hentoff, "Covering a Hustler," **The Civil Liberties Review**, July August, 1977, p. 51.
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12. Richard Rhodes, " 'Deep Throat' Goes Down in Memphis," **Playboy**, October, 1976, p. 181.
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29. Rhodes, p. 181.
30. Marro, p. 6.
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33. "Law Forces Porn," p. 1.
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39. "Flynt of 'Hustler,' " p. 3.
40. "A Bad Case," p. 52.
41. Rembar, p. 38.
42. " 'Tango' Not Obscene," **Variety**, May 2, 1973, p. 18.
43. Hentoff, p. 54.
44. Ibid.
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